



Nolle Prosequi: The High Court has a role under ss. 60 (1) and 123 (8) of the Constitution to supervise the Attorney General's exercise of the power to enter nolle prosequi under s. 26 (3) (c) of the Constitution and s. 82 (1) of the Criminal Procedure Code Cap 75; factors to be considered by the court in determining whether the exercise by the Attorney General of the power to enter nolle prosequi is proper. Obiter dictum: A reference under s.67 (1) of the Constitution covers wider Constitutional issues than an application under s.84 (1). A bench of three or more judges is not necessary under s.67 (1) of the Constitution where the matter referred to the High Court is interlocutory and the decision thereon does not result in disposal of the case in the lower court wholly in accordance with that decision.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Misc Crimi Case 50 of 2005

PHILEMON MUSEMBIAPPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

Philimon Musembi Muhindi, the applicant, is the accused in criminal case No. 350 of 2004 pending before the Senior Resident Magistrate at Vihiga in which he is facing criminal charges. The prosecution obtained several adjournments in the case because its witnesses had not turned up in court. When finally adjournment was declined the prosecution closed its case and on the day when a ruling whether there was a case to answer was to be delivered, the prosecution applied to enter nolle prosequi. The defence took objection. It also applied to have its objection referred to the High Court under section 67 (1) of the Constitution of Kenya and under Rules 2 and 3 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 {which are made pursuant to section 84 (6) of the Constitution}.

Upon the application for the reference being made, the trial magistrate referred to this court for decision under the said section the question whether the State's application to enter nolle prosequi in those circumstances should be allowed.

Under section 67 (3) of the Constitution, this court in determining a matter in connection with a reference to it under subsection (1) of section 67 is required to be composed of an uneven number of judges not being less than three unless the matter referred to is interlocutory. A reading of sub-rule 2 of section 67 shows that once a reference is made to this court under section 67 (1) of the Constitution, this court is enjoined to give its decision upon the question and the court in which the question arose must dispose of the case in accordance with that decision. Where however the determination of the reference by this court results in a decision that will not dispose of the case in the lower court, it is my view that such matter is interlocutory and, under subrule 3 of section 67 of the Constitution does not therefore

require a Bench of more than one judge. Perhaps the rationale in this is that a bigger Bench is not called for because in the event of error in the decision on an interlocutory matter, the determination of the case in the lower court does not wholly depend on such decision and moreover the case can still proceed to the High Court on appeal. In contrast, where the matter is not interlocutory and where the effect of this court's decision by a Bench of three or more is to determine wholly the final outcome of the case in the lower court without any prospect of reversal of such outcome by this court there is need to narrow the margin of any possible error by having a Bench of three or more perhaps on the principle that three or more heads are better than one.

In the application dated 17.6.2005, the applicant sought orders *“that the nolle prosequi aforesaid be declared null and void and that the exercise by the Attorney General of the power conferred upon him by section 26 (3) of the Constitution be subjected to the court's jurisdiction under sections 123 (8) and 65 (2) of the Constitution and that this court do exercise its supervisory powers to determine the questions drawn and filed in the aforesaid criminal case No.350 of 2004.*

A reference to this court by a subordinate court under s.67 (1) of the Constitution may relate to interpretation of any provision in the Constitution while a reference under section 84 (1) of the Constitution relates only to the fundamental rights and freedoms enshrined under sections 70 to 83 (inclusive) of the Constitution. In effect, therefore, a reference under section 67 (1) of the Constitution is wider as it can encompass fundamental rights and freedoms stipulated in sections 70 to 83 of the Constitution as well as other constitutional rights.

The question raised in the trial court by the defence and referred to this court under s.67 (1) of the Constitution is captured in the application. It is whether the Attorney General in the circumstances of this case exercised properly his discretionary power in seeking to enter nolle prosequi as he did and whether the applicant's rights were being violated by such action.

The Attorney General had power under section 26 (3) (c) of the Constitution and s.82 (1) of the Criminal Procedure Code Cap.75 to discontinue the criminal case in the lower court. Section 26 (3) (c) of the Constitution provides:-

26 (3) “The Attorney General shall have power in any case in which he considers it desirable so to do-”

(c) “to discontinue at any stage before judgment is delivered

any such criminal proceedings instituted or under-taken by himself or another person or authority.”

Under section 82 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya the Attorney General also had power to enter nolle prosequi.

The power of the Attorney General under these provisions cannot be easily challenged. But the exercise of that power can be challenged by dint of the fact that Section 60 (1) of the Constitution which confers on this court unlimited original jurisdiction in civil and criminal matters also recognizes the conferment on this court of such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. Under section 123 (8) of the Constitution, this court is vested with supervisory jurisdiction in relation to any question whether any person or authority has exercised any functions in accordance with the Constitution or any other law. Section 123 (8) provides:-

s. 123 (8) – “No provision of this Constitution that a person or authority

shall not be subject to the direction or control of any other person or authority

in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”

In short, the discretionary power of the Attorney General under section 26 (3) (c) of the Constitution and section 82 (1) of the Criminal Procedure Code is subject to the supervisory role of this court. In the circumstances of this case, did the Attorney General exercise this power properly and in accordance with the law? Constitutionally the Attorney General is a guardian of the public interest and has a particular role and a particular responsibility. The law expects the Attorney General to be guided, in discharge of his functions, by what is in the best public interest. His actions must therefore be for the public good. It is recognized that what is in the best public interest or is for the public good may not always be in tandem with political interest of those in power and that is why the Constitution has insulated the Attorney General and protected him from interference with a view to ensure the efficacy of his office. The test whether the Attorney General has exercised his discretionary power properly or not is determined by the answers to the questions whether the exercise of such power was in good faith, oppressive, capricious, antithetical to public interest or public good and whether it was influenced by irrelevant considerations, or corrupt practices or whether it was in accord with the Constitution and the law of the land or whether it amounted to abuse of the court process.

In the present case the applicant was entitled to expect to be treated fairly in the prosecution. He was entitled to “a fair hearing within a reasonable time” as provided by s.77 (1) of the Constitution.

The prosecution adduced evidence in support of the charge between 25/3/04 and 27/4/2005 and called twelve or so witnesses. Before closing its case the prosecution indicated that it required to call the document examiner. Repeatedly the case was adjourned because the said witness was not in court. Eventually, the court declined to grant further adjournment and required the prosecution to proceed. The prosecution then proceeded willy nilly to close its case. The trial Magistrate reserved his ruling on whether there was a case to answer. On 20.5.2005 when the Ruling was to be delivered, the prosecution applied to withdraw the case under section 82 (1) of the Criminal Procedure Code, Cap 75. The defence took objection, hence the reference under s.67 (1) of the Constitution.

It was apparent that without the evidence of the document examiner, the accused who faces ten counts of forgery and twelve of stealing was likely to be acquitted. The nolle prosequi was entered to forestall the likely acquittal. If this was not the case, it is difficult to fathom what other purpose the nolle prosequi was intended to serve in the circumstances of this case. The prosecution had been given ample opportunity and adjournments had repeatedly been granted to enable it to bring its witness to court but it had failed to do so. The court had used considerable amount of judicial time on the case and public resources had been expended to mount the prosecution in which a total of twelve (12) witnesses had testified. The Attorney General was enjoined to be fair in the prosecution of the case against the accused and to accord the accused a fair hearing within a reasonable time. The use of the nolle prosequi would undoubtedly prejudice the accused’s right to a fair hearing in that it would result in his discharge with the possibility of being charged again. It would be contrary to fair play to allow the Attorney General after prosecuting the accused as he has done to withdraw the case on flimsy grounds with the possibility that he can cause the accused to be charged yet again. Having closed its case in the circumstances that it did, the prosecution was clearly abusing the use of the nolle prosequi and the court process. The nolle prosequi is not intended to be used in such fashion. It is my finding that the use of the nolle prosequi to terminate the case was not in good faith or in public interest nor was it calculated to serve the interest of justice. On the contrary, it was mala fides and an attempt to subvert the rights of the accused. It was also mischievous. This court has constitutional and inherent power to stop the Attorney General from exercising his power of nolle prosequi improperly or using nolle prosequi to abuse the process of the court. To allow the Attorney General to use the nolle prosequi in the circumstances of this case would be to give him a carte blanche to ride roughshod on the accused. This court is entitled under sections 60 (1) and 123 (8) of the

Constitution to check improper use by the Attorney General of his discretionary power under s.26 (3) (c) of the Constitution and s.82 (1) of the Criminal Procedure Code to enter nolle prosequi.

I declare the exercise by the Attorney General of his power to enter nolle prosequi in this case improper and I order that the nolle prosequi presented in criminal case No.350 of 2001 in the Senior Resident Magistrate Court at Vihiga is null and void.

The criminal case shall proceed to defence hearing and the trial magistrate shall determine it in accordance with the provisions of the Criminal Procedure Code, Cap 75.

Dated at Kakamega this 11th day of November, 2005.

G. B. M. KARIUKI

JUDGE